

IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH, PUNE

**BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER**

ITA No. 213/PUN/2022 : A.Y. 2017-18

M/s. Vishay Components India Pvt. Ltd.
Loni Kalbhor, Near Loni Rly. Station
Pune-411 201
PAN: AAACB 9652 L

:Appellant

Vs.

The Asstt. CIT Cir. 12, Pune

Respondent

Appellant by : Shri Madhur Agarwal (through virtual)

Respondent by : Shri Kalika Singh (through virtual)

Date of Hearing : 07-09-2022

Date of Pronouncement : 13-09-2022

ORDER

PER SHRI PARTHA SARATHI CHAUDHURY, JM :

This appeal preferred by the assessee emanates from the order of the Id.

D.R.P. dated 25-01-2022 for A.Y. 2017-18 as per following grounds of appeal.

“Based on the facts and circumstances of the case, Vishay Components India Private Limited (hereinafter referred to as the 'Appellant') respectfully craves leave to prefer an appeal under section 253(1)(d) of the Income-tax Act, 1961 (hereinafter referred to as 'Act') against the order dated 15 February 2022 (received on 15 February 2022 via email) passed by the Additional/Joint/Deputy/Assistant Commissioner of Income Tax Income Tax Officer, National Faceless Assessment Centre, Delhi(hereinafter referred to as 'the learned AO') under section 143(3) read with section 144C(13) read with section 144B of the Income-tax Act, 1961 ('the Act') in pursuance of the directions dated 25 January 2022(received on 25 January 2022) issued by the Honorable Dispute Resolution Panel-3, Mumbai (hereinafter referred to as 'Hon'ble DRP') on the following grounds which are independent and without prejudice to each other:

On the facts and in the circumstances of the case and in law, the Hon'ble DRP and consequentially, the learned AO have:

1. Grounds of appeal in respect of transfer pricing adjustment

1. General ground challenging the transfer pricing adjustment of INR 4,05,24,870

Erred on facts and in law by making a transfer pricing adjustment to international transactions pertaining to manufacturing segment (amounting to INR 4,05,24,870) and not accepting the analysis undertaken by the Appellant to determine the arm's length price.

2. Non-consideration of the comparability analysis as documented in the transfer pricing study report

Erred in law on facts and in circumstances of the case by not considering comparability analysis documented in the transfer pricing study report for the purpose of determination of arms-length price for benchmarking analysis.

3. Inappropriate modification of turnover criteria applied by the Appellant

Erred on facts and in circumstances of the case and in law by not considering the turnover filter of INR 1 crore (i.e. rejecting companies having turnover lesser than INR 1 crore) as a comparable selection criteria and applying turnover criteria of rejecting companies having turnover less than INR 18.91 crores and more than INR 1,891.83 crores (which is selecting companies within 10 times higher or 10 times lower range), in respect of the international transactions pertaining to manufacturing activity without appreciating the fact the Appellant is engaged in the business of manufacturing whereas the aforesaid filter has been upheld by various adjudicating authorities in a situation where the tax payer engaged in the business of provision of software development services/ Information Technology enabled services.

4. Erroneous application of diminishing revenue filter and thereby rejection of Incap Limited ('Incap')

Erred on facts and in law by applying the diminishing revenue filter for acceptance/ rejection of the comparable companies in respect of international transaction pertaining to the manufacturing segment and thereby rejecting Incap on account of the said filter.

5. Rejection of certain comparable companies identified by the Appellant in the transfer pricing study report

Erred in rejecting comparable companies as mentioned below from the comparable set identified by the Appellant in the transfer pricing report in respect of international transactions pertaining to manufacturing segment of the Appellant:

- a. Variturn Electro Products Pvt. Ltd;
- b. Cermet Resistronics Private Limited; and
- c. Incap Limited

6. Accepting certain additional companies as comparable in relation to the manufacturing segment

Erred in accepting following additional companies as comparable to the manufacturing segment without appreciating the fact that the said companies are functionally not comparable to the manufacturing segment of the Appellant.

- a. Alcon Electronics Private Limited; and
- b. Easun - Mr Tap Changers Private Limited

7. Erroneous rejection of Keltron Components Complex Limited ('Keltron Components') as comparable company

Erred on facts and in law in rejecting Keltron Components as comparable company pertaining to manufacturing segment by not following the directions of Hon'ble [TAT in Appellant's own case for the past assessment years, wherein the said company was accepted as a functionally comparable company.

8. Inclusion of additionally identified company by the Appellant to the comparable set in relation to manufacturing segment

The Appellant prays to include following additionally identified company in the final set of comparables under the manufacturing segment:

a. Ampcontrol Equipments Private Limited (' Ampcontrol')

9. **Non-exclusion of depreciation while calculating the Profit level indicator of the Appellant as well as of the comparable companies**

Erred in facts and in law in considering depreciation as part of operating expenses of the comparable companies as well as the Appellant without giving due credence to the fact that the Appellant charges higher rate of depreciation (compared to depreciation rates provided in Schedule II of the Companies Act, 2013) vis-à-vis the comparable companies (which largely follow depreciation rates as prescribed in Schedule II of the Companies Act, 2013).

10. **Non- granting of adjustment for differential depreciation while computing the operating margins of the comparable companies**

Without prejudice to the ground no.9 above, erred in law and in facts in not granting adjustment for differential depreciation (i.e. by excluding excess depreciation instead of excluding the entire depreciation cost) while computing the operating margins of the comparable companies irrespective of the fact that there exists material difference in rates of the depreciation charged by Appellant and the comparable companies on the similar category of assets.

11. **Erred in considering foreign exchange gain/loss as non-operating in nature while computing the operating margins of the Appellant and the comparable companies**

Erred on facts and in law in considering foreign exchange gain/loss as non-operating in nature while computing the operating margins of the Appellant as well as the comparable companies.

12. **Erred in computing the amount of the transfer pricing adjustment in respect of the international transaction pertaining to manufacturing segment.**

Erred on facts and in law in computation of the transfer pricing adjustment in respect of the international transactions pertaining to manufacturing segment, which may be on account of the error in computation of operating margins of the Appellant and *lor* of the comparable companies.

13. **Need for adjustment on account of differences in the risk assumed by the Appellant and comparable companies**

Erred on facts and in law by comparing full fledged risk bearing entities with the Appellant's captive operations without making any adjust on account of differences between the functional and risk profile of comparable companies vis-à-vis risk profile of the appellant.

14. **Adopting different methodology for computation of transfer pricing adjustment in respect of international transactions forming part of the manufacturing segment of the Appellant, without considering the workings submitted by the Appellant in respect of the same**

Erred in law and in fact by proposing transfer pricing adjustment to the income of the Appellant in connection with the international transactions (in relation to manufacturing segment) by multiplying the difference in rate of operating margins of comparable companies and Vishay India, with the value of international transaction of export of finished goods and have not considered the methodology adopted by the Appellant for the computation of proportionate adjustment. which has been upheld by Hon'ble Commissioner of Income Tax (Appeals) ('CIT(A)') in Appellant's own case for A Y 2007-08 and A Y 2008-09.

II **Other grounds of Appeal**

15. **Erroneous computation of taxable income and the consequential tax liabilities**

Erred in facts and in law in the computation of taxable income and the consequential tax liabilities by not considering the relief of INR 86,43,200 granted by the Hon'ble DRP in the transfer pricing adjustment of INR 4,91,68,070 as proposed in the draft assessment order.

16. **Non consideration of Tax deducted at source ('TDS') of INR 90,000 in the computation of tax liability**

Erred in facts in not considering the TDS amount of INR 90,000 while computing the tax liability of the Appellant and consequential error in computation of interest liability under section 234C of the Act.

17. **Erroneous levy of interest under section 2348 of the Act**

Erred in levying additional interest under section 234B of the Act on account of unanticipated additions made to the total income of the Appellant on account of transfer pricing which is due to difference of opinion and as at the due date of payment of advance tax by no means the Appellant could have estimated such adjustments and consequential tax on such adjustment.

The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing of the appeal, so as to enable Honorable Income-tax Appellate Tribunal to decide this appeal according to law. “

2. The Id. Counsel for the assessee submitted that the issue in this case is covered by the relevant ITAT order for A.Y. 2010-11 and 2014-15 in assessee's own case. In this regard, the Id. Counsel apprised the Bench that substantially he would be referring to only one comparable i.e. Easun – Mr Tap Changers Pvt. Ltd., (hereinafter referred to as "Easun" for short) and submitted if this is accepted then for most of the grounds raised in the grounds of appeal, the assessee would be at home. This particular comparable has been taken by the T.P.O which is disputed by the assessee since the said company is functionally different from the assessee and hence cannot be held to be comparable while bench-marking international transactions in the manufacturing segment. In this background, the Id. Counsel took us through the financial statements of the assessee, i.e. Vishay Components India Pvt. Ltd. for the year ended 31-03-2017 relevant for A.Y. 2017-18.

6. The Id. Counsel further submitted that at page 92 para 24, the segmental information of the company is also provided. These have been annexed in the paper book filed before us. It was also submitted that the facts and circumstances and the nature of business carried on by the assessee are absolutely, identical and similar to A.Y. 2010-11. In order to demonstrate this fact, the Id. Counsel referred to the Tribunal's order annexed at page 468 onwards in the paper book in assessee's own case in ITA No. 585/PUN/2015, for A.Y. 2010-11, order dated 13-01-2020. The facts leading to the activities of the assessee have been discussed by the Tribunal as follows:

3. We have heard both the sides and gone through the relevant material on record. It is made clear that admittedly there is no dispute on the application of the TNMM as the most appropriate method and aggregation of the four sets of international transactions under the Manufacturing segment, which have been accepted by the TPO. In so far as the working out of the assessee's own PLI is concerned, the assessee is aggrieved by the adoption of operating profit after depreciation. The Id. AR fairly settled down to admit that difference on account of rates of depreciation on individual assets (not the quantum of depreciation or the percentage of depreciation on overall basis) should be adjusted. We agree with this contention and hold that the operating profit of the assessee and that of the comparables should be calculated after depreciation since depreciation is an integral part of the operating cost. It is further held that no adjustment can be allowed if there is difference just on account of the amount of depreciation or percentage of depreciation to a certain base. An adjustment can be allowed in the computation of profit of the comparables only if there is difference in the rates of depreciation as charged by the assessee and comparables on the same assets.

.....

5. Another issue raised by the assessee is against the making of transfer pricing addition in respect of the whole segment rather than restricting it only to the international transactions. This issue is no more res integra in view of several judgments rendered by various higher forums including the Hon'ble jurisdictional High Court holding that the transfer pricing adjustment should be restricted only to the international transactions and not the entity level transactions. The Hon'ble jurisdictional High Court in CIT Vs. Phoenix Mecano (India) Pvt. Ltd. (2019) 414 ITR 704 (Bom.) has held that the transfer pricing adjustment made at entity level should be restricted to the international transactions only. Here, it is pertinent to mention that the Department's SLP against the judgment in the case of Phoenix Mecano (India) Pvt. Ltd. has since been dismissed by the Hon'ble Supreme Court in CIT Vs. Phoenix Mecano (India) Pvt. Ltd. (2018) 402 ITR 32 (St.). Similar view has been taken by the Hon'ble Bombay High Court in CIT Vs. Thyssen Krupp Industries Pvt. Ltd. (2016) 381 ITR 413 (Bom.) and CIT Vs. Tara Jewels Exports (P). Ltd. (2010) 381 ITR 404 (Bom.). We, therefore, direct to restrict the transfer pricing addition only in respect of transactions with Associated Enterprises."

7. The Id. Counsel submitted that identical facts and the business activities also appear for the relevant assessment 2017-18 in respect to the assessee. The Id. D.R broadly accepted this contention.

8. Coming now to the reference of the comparables the Id. A.R submitted for exclusion of the following:-

Easun – Mr. Tap Changers (P) Ltd.

The assessee disputes inclusion of this comparable by the T.P.O in its manufacturing segment since the company Easun is functionally different with that of the assessee. The submission of the assessee before the T.P.O regarding this comparable is as follows:

“At the time of preparation of the transfer pricing documentation for FY 2016-17, the assessee has not considered Easun– Mr Tap Changers Pvt. Ltd., as it did not appear in the accept reject matrix at the time of preparation of TP study.

The assessee would like to submit that Easun cannot be accepted as comparable to the manufacturing segment of the assessee for FY 2016-17 on account of the following reasons.

Easun is engaged in supplying spares as well as rendering repair and maintenance services and hence,

Non-availability of segmental information; and

Fails to satisfy employee cost filter applied by your goodself.”

9. However, the T.P.O did not accept the submissions of the assessee and held as follows:

As per page No. 2 of the annual report of the company, main product of company is on load tap changer;

As per page No. 8 of the annual report of the company, the companies Description of main products/services is on load tap changer.

From the above it is evident that is engaged in manufacture of on load tap changer used in various electronic products.

The discussion on employee cost filter is made above in the order.

The company is engaged in into single segment of manufacturing of fixed capacitors Dieletrc of Papr/Plastic, so, no segmental information is needed.

10. The Id. D.R.P has discussed this comparable from page 72 onwards of their findings. The assessee has submitted detailed written submissions as to

why this company i.e. Easun should not be taken as comparable with that of the assessee in the manufacturing segment. Broadly, the assessee has submitted that the said company has functionally different profile and most significantly the submission was that Easun has a similar product particular with another company, called C.T.R. Manufacturing Industries Ltd., as both the entities deal in Tap Changers. The assessee has thereafter high-lighted all these submissions and has given details as to the similarity of functional procedure of Easun and CTR Manufacturing Industries Ltd.. Further, it was submitted before the Id. D.R.P that both the companies i.e. Easun and CTR Manufacturing Industries Ltd. deal in load tap changer which are used in transformers. Further, ITAT in assessee's own case for A.Y. 2010-11 and 2014-15 has rejected CTR Manufacturing Industries Ltd., as a comparable company and accordingly Easun – Mr Tap Changers Pvt. Ltd. should also be rejected as a comparable company on account of non-comparable product profile. However, this submission did not find favour with the Id. D.R.P and it held as follows:

“(ii) Easun – Mr. Tap Changers Pvt. Ltd.

The assessee has contended that the company is engaged in the manufacture of various products like OL TC, OCTC, Motor Drive Unit, Oil Surge Relay, Retrofit, Transformer Motoring Unit, etc. In this regard, the assessee has relied upon the information available on the website of the company. Further, referring to the Annual Report, it is contended that principal operation of the company is that of Tap Changer spares and service of Tap Changers. The assessee has also contended that segmental data is not available.

The TPO has observed that as per the Annual Report, the company is engaged in manufacture of load tap changers. In our view, the company is functionally broadly comparable to the assessee. As already stated above, the benchmarking method used is TNMM, which requires only broad comparability. The transactional net margin method is that net profit indicators (e.g. return on assets, operating income to sales, and possibly other measures of net profit) are less affected by transactional differences than is the case with price, as used in the CUP method. Net profit indicators also may be more tolerant to some functional differences between the controlled and uncontrolled transactions than gross profit margins. Differences in the functions performed between enterprises are often reflected in variations in operating expenses. Consequently, this may lead to a wide range of gross profit margins but still broadly similar levels of net operating profit indicator. As regards the contention of the assessee that the company's operations include Tap Changer spares and service of Tap Changers, it is seen that the assessee has in this regard referred to the Annual Report for the period 01/04/2017 to 31/03/2018. Therefore, this contention is not acceptable and the question of non-availability of segmental data does not arise. **Considering the facts of the case, we hold that the**

company is functionally broadly comparable to the assessee and, accordingly, upholds its inclusion as a comparable by the T.P.O

9.2.2 In view of the above discussion, ground of objection No. 8 is rejected.”

11. The Id. Counsel demonstrated before us through the Annual Report of Easun and also the Directors' report that this company is functionally different from the assessee since altogether the products which they are dealing in are different from that of the assessee and this company, therefore, cannot be held to be comparable in the manufacturing segment. The Id. Counsel further demonstrated that Easun is functionally similar with that of CTR Manufacturing Industries Ltd., as both are dealing in Tap Changers. This has been even placed on record as submitted before the Id. D.R.P. Having said so, we find the Tribunal in assessee's own case for A.Y. 2011-12 and 2014-15 (supra) has rejected CTR Manufacturing Industries Ltd. as comparable to the assessee and has directed exclusion of the said company and in the same functional profile, Easun is also dealing with and following the same parity of reasons in the same set of facts and circumstances Easun should also be excluded as comparable with that of the assessee while bench-marking the international transactions in the manufacturing segment. The Tribunal in ITA No. 585/PUN/2015 for A.Y. 2010-11, order dated 13-01-2020, held as follows:

(i) CTR Manufacturing Industries Limited

8. The TPO included CTR Manufacturing Industries Limited, with OP/OC at 22.80%, in the list of comparables. The assessee contended before the TPO that this company was functionally non-comparable. The TPO refused to accept the contention on the ground that the assessee was treating CTR Manufacturing Industries Limited as comparable since 2006-07. The DRP did not change the fortune of the assessee on this issue, against which the assessee has come up in appeal before the Tribunal.

9. Having heard both the sides and gone through the relevant material on record, it is observed that the assessee in the Manufacturing segment is involved in the manufacture of Resistors like high voltage resistors, low voltage resistors, power resistors etc. and Capacitors like film capacitors, trimmer capacitors and power capacitors used in various electronic applications/products. The assessee's figure of net sales, as given in its Profit and Loss account, is Rs.138.06 crore with majority of sale of Capacitors at Rs.83.42 crore (60% of total sales); Resistors at Rs.44.74 crore; and the remaining amount as Outsourcing income. Sale price charged by the assessee from Capacitors is roughly Rs.3/- per unit. We have examined the Annual report of CTR Manufacturing Industries Limited, a copy of which has been placed on record. Total Sales of this company at gross

level is Rs.121.01 crore. Break-up of Sales has been given at Note no. 10 with the major item in terms of revenue as Tap changers and Remote Tap changer Control Cubicles at Rs.71.92 crore. Per piece sale price is Rs.2,13,948. The amount of revenue from sale of Plastic Film Capacitors, being, one of the items as the assessee is dealing in, is only Rs.9.95 crore. Thus, in terms of percentage, the revenue from sale of comparable item of CTR Manufacturing Industries, being, Capacitors is less than 9%. This shows the level of divergence of the products dealt with by the assessee on one hand and CTR Manufacturing Industries Limited on the other.

10. The TPO, for including this company in the list of comparables, has relied on the fact that the assessee itself included this company as comparable in the assessment year 2006-07 onwards. We have gone through the details placed on record by the assessee, which show that in the Financial year relevant to the assessment year 2006-07, CTR Manufacturing Industries Limited was having a separate reportable segment of Electronics and electrical capacitors in addition to Transformer ancillaries and Others. The assessee considered only the segment of Electronics and electrical capacitors for the purposes of inclusion. Similar position went on for the assessment years 2007-08 and 2008-09 as well when CTR Manufacturing Industries Limited continued to have a separate reportable segment of Electronics and Electrical capacitors. However, from the assessment year 2009-10, CTR Manufacturing Industries, merged its hitherto reportable segment of Electronics and electrical capacitors with Transformer ancillaries segment or Others segment. Annexure 2 to Notes on accounts for the year under consideration contains Segmental reporting. There are two primary segments of business, namely, Transformer Ancillaries with revenue of Rs. 106.46 crore and Others with revenue of Rs.14.54 crore. It is because of the omission/merger of a separate reportable segment matching with the assessee that it has been rendered non-comparable because of non-identification of the segmental information relating to electrical capacitors. The TPO has adopted the entity level figures of this company for the purposes of inclusion in the list of comparables, which cannot be held as comparable. Under these circumstances, we direct the exclusion of CTR Manufacturing Industries Limited from the list of comparables in the assessee's Manufacturing segment"

12. We further find that in assessee's own case for A.Y. 2014-15 in ITA No. 1969/PUN/2018, order dated 19-01-2021 again, CTR Manufacturing Industries Ltd. was held to be non-comparable to that of the assessee. When Easun is functionally similar with CTR Manufacturing Industries Ltd., and since CTR Manufacturing Industries Ltd. has been held to be non-comparable with that of the assessee, in the same facts and circumstances, Easun should also be excluded in the final set of comparables as regards the assessee in the manufacturing segment and we direct the A.O/TPO accordingly. This answers the substantial ground of appeal raised before us.

13. The Id. Counsel for the assessee submitted, ground No. 15 is consequential and ground No. 16 which is with regard to the non-consideration of TDS, the matter may be remanded to the file of the A.O/TPO for the purposes

of verification. The Id. D.R did not raise any objection. Therefore, having heard the parties ground No. 16 is remanded to the file of the A.O/T.P.O for the said verification as per law while complying with the principles of natural justice. This ground is allowed for statistical purposes.

14 In the combined result, the appeal of the assessee is partly allowed for statistical purposes.

The Order pronounced in the open Court on this 13th September 2022.

Sd/-
(R.S. SYAL)
VICE PRESIDENT

sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated, this 13th day of September 2022
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT- 1, Pune .
4. The CIT – DRP-2
5. The D.R. ITAT 'C' Bench Pune.
6. Guard File

BY ORDER,

Sr. Private Secretary
ITAT, Pune

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| | | Date | |
|----|--|------------|----------|
| 1 | Draft dictated on | 07-09-2022 | Sr.PS |
| 2 | Draft placed before author | 12-09-2022 | Sr.PS |
| 3 | Draft proposed and placed before the second Member | | JM/AM |
| 4 | Draft discussed/approved by second Member | | AM/JM |
| 5 | Approved draft comes to the Sr. PS/PS | | Sr.PS/PS |
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